(1) Supreme Court, U.S.
FILED

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No. ~~OFFICE OF THE CLERK~~

IN THE SUPREME COURT OF THE UNITED STATES

VENTURE COAL SALES COMPANY, SANNER ENERGIES, INC.,
and FUTURE INDUSTRIES, INC.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

1. Should the Court resolve the split between the Circuits as to whether or not a statute of limitations commences to run before a law has been declared unconstitutional?

2. Should the Court resolve the split between the Circuits as to whether or not a limitations period will be tolled when a claim is inherently unknowable because a law has not yet been declared unconstitutional?

3. Should the Court define the due process required "meaningful, lookback period" after a law is declared unconstitutional to include a limited period during which the taxpayer may recoup the monies improperly collected from it by the Federal Government?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners are Venture Coal Sales Company, a Pennsylvania General Partnership, Sanner Energies, Inc., a Pennsylvania corporation, and Future Industries, Inc., a Pennsylvania corporation. There are no parent corporations for any of the Appellants and no publicly held companies own any of the stock of any of the Appellants.

The Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Venture Coal Sales Company, Sanner Energies, Inc., and Future Industries, Inc., (collectively "the Coal Companies") respectfully petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the Federal Circuit ("the Federal Circuit").

OPINIONS BELOW

The opinion of the Federal Circuit is reported at 370 F.3d 1102 and reproduced in Petitioners Appendix (hereinafter "APP") at App 3.

The opinion of the United States Court of Federal Claims is reported at 47 Fed. Cl. 52 and reproduced in Petitioners Appendix at App 2.

JURISDICTION

Judgment of the Federal Circuit was entered on June 1, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

(For verbatim text, see Appendix 1)

1. Export Clause of the United States Constitution Article I, Section 9, Clause 5

2. Fifth Amendment to the United States Constitution

3. Tucker Act, 28 U.C.S. § 2501

4. Tucker Act, Section 1491(a)(1)

5. Coal Sales Tax 26 U.S.C. § 4121

6. 26 U.S.C.S. § 4221(a)(2)

7. Internal Revenue Service Bulletin 2000-21, May 22, 2000

STATEMENT OF THE FACTS

The Appellants, Venture Coal Sales Company, Sanner Energies, Inc., and Future Industries, Inc., are small related Pennsylvania companies that are and have been in the business of mining coal and selling coal both domestically and through export. The Appellants have been complying with the requirements of the Coal Sales Tax provisions of the Internal Revenue Code, 26 U.S.C.S. § 4121, which imposes a tax "on coal from mines located in

the United States sold by the producer." Export sales of coal were specifically not exempted from the Coal Sales Tax by virtue of 26 U.S.C.S. § 4221(a)(2).

In *Ranger Fuel Corporation, et al., v. United States of America,* 33 F.Supp. 2d 466 (E.D. VA 1998), the United States District Court for the Eastern District of Virginia held that the United States' imposition of the Coal Sales Tax on coal sold for export violated the Export Clause of the United States Constitution, Article I, Section 9, Clause 5. Before the *Ranger Fuel Corporation* decision, the Appellants did not believe and had no reason to believe that the Coal Sales Tax was invalid as to export coal. Not only did the Coal Sales Tax, 26 U.S.C.S. § 4121, apply by its terms to all coal produced in the United States, but also in 26 U.S.C.S. § 4221(a) the Coal Sales Tax imposed by § 4121 was specifically excluded from the tax free export sale treatment.

The remedy for violation of the Export Clause of the United States Constitution, Article I, Section 9, Clause 5, is return of the money unlawfully exacted. A cause of action exists post *Ranger Fuel* under the Export Clause for recovery of the tax paid independent of any tax refund statute, as held by the Federal Circuit Court of Appeals in *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369 (Fed

Cir. 2000), cert den., 150 L.Ed. 2d 208, 121 S. Ct. 2214 (U. S. 2001). Appellants seek to recover the Coal Sales Tax that they paid during the period of the first quarter of 1988 through the end of the second quarter of 1995 on coal that they sold for export on the grounds that the tax violated the Export Clause of the United States Constitution, Article I, Section 9, Clause 5, and therefore is unconstitutional and void.

The Coal Companies filed suit in the United States Court of Federal Claims to recoup as damages the above referenced taxes paid, which claim comes within the Court's jurisdiction under the Tucker Act, 28 U.S.C.S. § 1491(a)(1).

The action below has been filed timely under the six year jurisdictional limit of the Tucker Act, 28 U.S.C.S. § 2501, because: (1) the Appellants' cause of action for recovery of the taxes paid did not accrue until the *Ranger Fuel Corporation* decision which was the last significant event necessary to make a refund claim actionable; (2) the limitations period was tolled and did not begin to run on the Appellants' claim until the *Ranger Fuel Corporation* decision, because until that decision the claim was inherently unknowable; and (3) Due Process requires that the Appellants be given a meaningful lookback period after the statute was declared unconstitutional in which to recoup

moneys improperly collected from them by the federal government;

The United States Court of Federal Claims at 57 Fed. C.L. 52 (2003) on April 30, 2003, granted a motion by the United States for dismissal under R.C.F.C. 12(b)(1) for lack of subject matter jurisdiction. The Appellants appealed to the Federal Circuit Court of Appeals which had jurisdiction of the Appeal pursuant to 28 U.S.C.S. § 1295(a)(3). The Court of Appeals issued a decision on June 1, 2004, at 370 F.3d 1102, affirming the decision of the United States Court of Federal Claims.

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD RESOLVE THE SPLIT BETWEEN CIRCUITS AS TO WHETHER OR NOT A STATUTE OF LIMITATIONS COMMENCES TO RUN BEFORE A LAW HAS BEEN DECLARED UNCONSTITUTIONAL.

The Federal Circuit Court of Appeals in the case below held that Venture's cause of action for refund of taxes that were paid under a statute that was later held to be unconstitutional accrued, not when the statute was held to be unconstitutional, but when the taxes were paid. The Fifth Circuit Court of Appeals on the other hand held in the *United States v. One 1961 Red Chevrolet Impala Sedan,* 457

F. 2d 1353 (5th Cir. 1972), that the statute of limitations did not begin to run until the Plaintiff had a right to enforce his cause of action which began when the statute was held to be unconstitutional. Venture, Sanner and Future are three small Coal Companies who paid their taxes as required in the reasonable belief that the tax in question was constitutionally imposed. Only after the Court in *Ranger Fuel Corporation, et al., v. United States of America,* 33 F. Supp. 2d 466 (E.D. VA 1998), held the taxing statute to be unconstitutional as it applies to export coal, [which the Internal Revenue Service accepted in Internal Revenue Service Bulletin, Notice 200-28, 2000-211, I.R.B. 1116 (May 22, 2000)]could the period of limitations begin to run on Venture, Sanner and Future's rights to a refund of taxes they previously paid under the now unconstitutional taxing statute. The Coal Companies filed a refund suit for these taxes within the six year period of limitations provided by the Tucker Act, 28 U.S.C. § 2501, but the U.S. Court of Federal Claims held that because the claims were for taxes paid more than six years before suit was filed, even though the suit was filed within six years of the *Ranger Fuel* decision, the six year statute of limitations contained in the Tucker Act barred the Coal Companies' claims. The Federal Circuit Court of Appeals affirmed the Court of Claims decision.

Contrary to the decision of the Fifth Circuit Court of Appeals referred to above, the Federal Circuit Court of Appeals in the case below held that a cause of action for a refund accrues before the statute is ever declared to be unconstitutional. The position of the Coal Companies, like the position of the Fifth Circuit, is that until the statute is declared to be unconstitutional the party that paid pursuant to the statute has no right to a refund and therefore a cause of action for a refund cannot accrue until the statute is held to be unconstitutional because this court decision is the last significant event necessary in order to make a claim for a refund actionable.

> "The period of limitations does not always begin on the date of the wrong. (citation omitted.) No cause of action generally accrues until the plaintiff has a right to enforce his cause. (citations omitted.) The right to sue is hollow indeed until the right to succeed accompanies. Patently, appellant in the instant case had no reasonable probability of successfully prosecuting his claim against the government prior to the [Court decision holding the Federal Statute unconstitutional]. We realize that mere ignorance of one's rights will not toll the limitations period. (citations omitted.) This is not, however, a case in which a plaintiff is ignorant of his rights, but rather a case of a plaintiff without a right." *United States v. One 1961 Red Chevrolet Impala Sedan,* supra 1358.

It is respectfully submitted that the Supreme Court should grant certiorari to consider and resolve the dispute between the Circuits on this issue.

2. THE COURT SHOULD RESOLVE THE SPLIT BETWEEN THE CIRCUITS AS TO WHETHER OR NOT A LIMITATIONS PERIOD WILL BE TOLLED WHEN A CLAIM IS INHERENTLY UNKNOWABLE BECAUSE A LAW HAS NOT YET BEEN DECLARED UNCONSTITUTIONAL.

The Coal Companies dutifully paid their taxes in accordance with the law while not being aware that the coal sales tax on exports was unconstitutional. Until the *Ranger Fuel* decision, the Coal Companies in the exercise of reasonable diligence could not learn that they would have a right to refund of taxes because the Coal Sales Tax Act, as a duly exacted Federal law, was in full force and effect. Duly enacted statutes of the United States are entitled to a presumption of constitutionality. *Reno v. Condon,* 528 U.S. 141, 148, 120 S.Ct. 666, 670, 145 L.Ed.2d 587, 594 (2000).

Federal Courts have sometimes postponed the running of the limitations period: "in actions against the United States where the claimant did not know, and in the exercise of reasonable diligence, could not learn that a claim has accrued. The benefit of such a postponement may be obtained if a claim was 'inherently unknowable' at accrual." *Virginia Dare Neely v. United States, supra* p. 1068. This

principle has been acknowledged not only in the Third Circuit but also in other Circuits including the Federal Circuit. See *L.S.S. Leasing Corporation v. United States,* 695 F.2d 1359 (Fed. Cir. 1982); *Japanese War Notes Claimants Association v. United States,* 178 Ct. Cl. 630, 373 F. 2d. 356 (1989), cert. denied, 389 U.S. 971, 19 L.Ed. 2d. 461, 88 S.Ct. 466 (1967). The Courts considering the topic have likewise held that "the 'inherently unknowable' doctrine stands for no more than that the 'statute will not being to run until [the claimant] learns or reasonably should have learned of his cause of action." *L.S.S. Leasing Corporation v. United States, supra.* The Third Circuit Court of Appeals in *Virginia Dare Neely v. United States, supra,* held that the running of the limitations period in claims against the United States for recoupment of funds based upon the unconstitutionality of a statute will be postponed until the Court decision is handed down that holds the statute to be unconstitutional. The Third Circuit based its decision on the fact that the injury was inherently unknowable to the Claimant until the statute was held to be unconstitutional. To assert otherwise, the Third Circuit pointed out, "requires a litigant to possess constitutional prescience that this Court itself does not possess." *supra* 1068. Totally to the contrary the Federal Circuit in the case

below held that all taxpayers should be treated as if they had this "sixth sense". Those unfortunate taxpayers without this sixth sense must challenge every new taxing statute or lose their right to be made whole if the statute is later held to be unconstitutional. It is respectfully submitted that the position of the Third Circuit is much more reasonable and that this Honorable Court should accept certiorari to resolve this dispute between the Circuits.

3. CERTIORARI SHOULD BE GRANTED TO DEFINE "MEANINGFUL BACKWARD LOOKING RELIEF" AS REQUIRED BY THE DUE PROCESS CLAUSE

This Honorable Court in *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 110 L.Ed. 2d 17, 110 S. Ct. 2238 (1990), held that the Due Process Clause of the Constitution requires "meaningful, backward looking relief" after a taxing statute has been held to be unconstitutional. Unfortunately the full meaning of this requirement has been left unanswered by the Court, particularly when the taxes were paid more than six years before the statute was held to be unconstitutional. The Federal Circuit has taken the position that there is no

meaningful, backward looking relief for taxes paid more than six years before the statute was held to be unconstitutional. The Coal Companies disagree and believe that meaningful, backward looking relief means that the taxpayer will have some reasonable period of time after the statute has been held unconstitutional, as dictated by the applicable statute of limitations, during which the taxpayer may seek relief in the form of a refund of all taxes paid by that party under the statute in question.

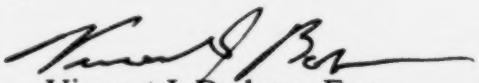
The Coal Companies believe that this Honorable Court's statement in *McKesson* that various procedural requirements could be imposed relative to the meaningful, backward looking relief, including enforcing a statute of limitation, means that reasonable time limits can be placed on the length of time during which a claim can be brought for refund after the statute is held to be unconstitutional. On the other hand, the Federal Circuit's interpretation of this Honorable Court's decision would preclude meaningful, backward looking relief for any taxpayer who last paid the tax more than a certain number of

years before the Court's ruling on the statute's constitutionality. The Coal Companies believe that the Due Process Clause of the Fifth Amendment requires otherwise when it mandates "meaningful backward looking relief". This unanswered question as to "meaningful backward looking relief" cries out for an answer by this Court, and therefore certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,



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APPENDIX

App. 1

STATUTES, REGULATIONS, ETC.

TITLE 28, UNITED STATES CODE

§ 1491. Claims against United States generally

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution. . .

TITLE 28, UNITED STATES CODE

§ 2501. Time for filing suit

Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

TITLE 26, UNITED STATES CODE

§ 4121. Imposition of Tax

(a) Tax Imposed. --

(1) In general. - There is hereby imposed on coal from mines located in the United States sold by the producer a tax . . . .

SEC. 4221. Certain Tax-Free Sales.

(a) General Rule. - Under regulations prescribed by the Secretary, no tax shall be imposed under this chapter (other

than under section 4121, . . .) on the sale by the manufacturer . . . of an article -

. . . (2) for export, . . .

2000-21 I.R.B. MAY 22, 2000

Coal Exports

Notice 2000-28

This notice provides guidance relating to the coal excise tax imposed by § 4121 of the Internal Revenue Code. The notice provides rules under the Code for making a nontaxable sale of coal for export or for obtaining a credit or refund when tax has been paid with respect to a nontaxable sale of coal for export.

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 9, Cl. 5. Tax on exports from state.

No Tax or Duty shall be laid on Articles exported from any State.

App. 2

Motions, Pleadings and Filings
UNITED STATES COURT OF FEDERAL CLAIMS.

VENTURE COAL SALES COMPANY,
Sanner Energies, Inc., and
Future Industries, Inc., Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 02-1455T.

June 24, 2003.

Taxpayers filed complaint against the United States, seeking to recover coal sales taxes they paid for the first quarter of 1988 through the second quarter of 1995. On defendant's motion to dismiss, the Court of Federal Claims, Sypolt, J., held that: (1) for purposes of six-year statute of limitations on suits against the United States in the Court of Federal Claims, taxpayers' claims did not accrue when district court in separate case held that statute imposing taxes on export sales of coal violated the Export Clause; (2) claims accrued when the taxes were paid or the unconstitutional statute was enacted; and (3) statute of limitations was not tolled until statute was held unconstitutional.

Motion granted.

West Headnotes

[1] Federal Courts 1107
170Bk1107 Most Cited Cases

For purposes of six-year statute of limitations on suits against the United States in the Court of Federal Claims, claims for refund of coal sales tax paid on coal produced and sold for export did not accrue when district court in separate case held that statute imposing taxes on export sales of coal violated the Export Clause; rather, claims accrued when the taxes were paid or the unconstitutional statute was enacted. U.S.C.A. Const. Art. 1, § 9, cl. 5; 26 U.S.C.A. § 4121; 28 U.S.C.A. § 2501.

[2] Federal Courts 1106
170Bk1106 Most Cited Cases

To toll a statute of limitations, a claimant must show either that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was inherently unknowable at the accrual date.

[3] Federal Courts 1106
170Bk1106 Most Cited Cases

Ignorance of rights which should be known does not suffice to toll a statute of limitations.

[4] Federal Courts 1106
170Bk1106 Most Cited Cases

Six-year statute of limitations applicable to claims for

refund of coal sales tax paid on coal produced and sold for export was not tolled until district court in separate case held that statute imposing sales tax on export sales of coal violated the Export Clause, on ground that claims were "inherently unknowable" until district court's decision, because acts of Congress are presumed to be constitutional. U.S.C.A. Const. Art. 1, § 9, cl. 5; 26 U.S.C.A. § 4121; 28 U.S.C.A. § 2501.

West Codenotes
Recognized as Unconstitutional

26 U.S.C. § 4221(a)(2) (1994)

***52** Vincent J. Barbera, Somerset, PA, for plaintiffs.

Robert Stoddart, Attorney, Court of Federal Claims Section, Tax Division, Department of Justice, Washington, D.C., with whom were Eileen J. O'Connor, Assistant Attorney General, Mildred L. Seidman, Chief, Court of Federal Claims Section, for defendant.

Opinion and Order [FN1]

> FN1. This opinion and order was originally filed on April 30, 2003. It is being re-issued for publication, with minor emendations, in response to defendant's June 13, 2003 request.

SYPOLT, Judge.

This case is before the court on defendant's motion to

dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims (RCFC). Because plaintiffs' claim was not brought within the six-year statutory period provided by 28 U.S.C. § 2501(a), defendant's motion is granted.

53 *Standard of Review

On a motion to dismiss pursuant to RCFC 12(b)(1), the court views the facts alleged in the complaint as true. *Pixton v. B & B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir.2002) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). Dismissal is inappropriate if the facts reveal any reasonable basis upon which the non-movant may prevail. *Id.*

A party seeking "the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists," *Awad v. United States*, 301 F.3d 1367, 1375 (Fed.Cir.2002) (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir.1991)), and must do so "by a preponderance of the evidence," *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed.Cir.1988). When jurisdictional facts are challenged, the court may consider evidence outside the pleadings. *See Reynolds*, 846 F.2d at 747.

Subject Matter Jurisdiction

The United States Court of Federal Claims lacks jurisdiction to hear any claim that is not "filed within six years after such claim first accrues." 28 U.S.C. § 2501. This statutory period "is a jurisdictional requirement provided by Congress

that must be strictly construed." *Bowen v. United States,* 292 F.3d 1383, 1385 (Fed.Cir.2002) (citing *Hopland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1577 (Fed.Cir.1988)).

"[F]iling within the six-year period [is] a condition of the waiver of sovereign immunity in the Tucker Act." *Frazer v. United States,* 288 F.3d 1347, 1351 (Fed.Cir.2002) (quoting *Caguas Central Federal Savings Bank v. United States,* 215 F.3d 1304, 1310 (Fed.Cir.2000)); *see United States v. Mottaz,* 476 U.S. 834, 841, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986) ("[when] waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity") (quoting *Block v. North Dakota,* 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L. Ed.2d 840 (1983)).

Discussion

[1] Plaintiffs filed their complaint on October 23, 2002, seeking to recover taxes they paid pursuant to the Coal Sales Tax, 26 U.S.C. § 4121 (1994) ("Coal Tax"), for the first quarter of 1988 through the second quarter of 1995. The Coal Tax imposes a tax "on coal from mines located in the United States sold by the producer." Export sales of coal are not exempt from the Coal Tax. *See* 26 U.S.C. § 4221(a)(2) (1994) ("No tax shall be imposed under this chapter (*other than section 4121* ...) on the sale ... for export ...") (emphasis added). Plaintiffs seek to recover only their payments for coal produced and sold for export.

Plaintiffs argue that they are entitled to a refund because

these taxes violate the Export Clause, U.S. Const. Art. I, § 9, cl. 5, as the United States District Court for the Eastern District of Virginia held in *Ranger Fuel Corporation v. United States,* 33 F.Supp.2d 466 (E.D.Va.1998). Plaintiff's claim in this court is founded on the "groundbreaking holding" of the United States Court of Appeals for the Federal Circuit, in *Cyprus Amax Coal Co. v. United States,* 205 F.3d 1369, 1374 (Fed.Cir.2000), that claims for damages caused by Export Clause violations come within this court's jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994).

Defendant, however, argues that plaintiffs did not file their claim within the Tucker Act's six-year statutory period because the taxes for which they are seeking compensation were paid more than seven years ago, between 1988 and 1995, whereas the complaint was not filed until the end of the third quarter of 2002. Plaintiffs assert that their action is timely because it was brought within six years of the *Ranger Fuel* decision, which held that the plaintiffs in that case were entitled to a refund of excise taxes they paid pursuant to the Coal Tax because the Coal Tax was unconstitutional as applied to exports. 33 F.Supp.2d 466.

A claim against the United States "first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Bowen v. United States,* 292 F.3d at ***54** 1385 (quoting *Chandler v. United States,* 47 Fed.Cl. 106, 113 (2000)); *Alliance of Descendants of Texas Land Grants v. United States,* 37 F.3d 1478, 1481 (Fed.Cir.1994) (citing *Japanese War Notes Claimants Ass'n v. United States,* 178

Ct.Cl. 630, 373 F.2d 356, 358 (1967)); *see also Nager Electric Co. v. United States,* 177 Ct.Cl. 234, 368 F.2d 847, 851 (1966).

In this case, a claim accrued each time the plaintiffs paid tax on coal sold for export. *Cf. Swisher International, Inc. v. United States,* 205 F.3d 1358, 1369 (Fed.Cir.2000), *cert. denied,* 531 U.S. 1036, 121 S.Ct. 624, 148 L.Ed.2d 533 (2000) (holding that a claim accrued upon payment of the unconstitutional Harbor Maintenance Tax for purposes of the Court of International Trade's two-year limitations period). Thus, plaintiffs were entitled to a refund either pursuant to the Internal Revenue Service refund procedures or based on a violation of the Export Clause, which is self-executing. *Cyprus Amax,* 205 F.3d at 1374.

If, as plaintiffs contend, their claim did not accrue until the *Ranger Fuel* case was decided, they do not come within the holding in *Ranger Fuel,* which awarded tax refunds to the plaintiffs based on accruals that accrued prior to the filing of the plaintiffs' complaint.

Plaintiffs' reasoning also was rejected by the Federal Circuit in *Catawba Indian Tribe of South Carolina v. United States,* 982 F.2d 1564, 1570 (Fed.Cir.1993), *cert. denied,* 509 U.S. 904, 113 S.Ct. 2995, 125 L.Ed.2d 689 (1993), holding that the tribe's takings claim began to run when Congress enacted the Termination Act, not when the statute's legal effect was decided by the Supreme Court. The Federal Circuit specifically held that a statute's effect and objective meaning are fixed when the statute is adopted, not when it is first construed by a court:

> While the Supreme Court's pronouncement ... might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.
>
> *Id.* (emphasis in original) (citations omitted).

Similarly, plaintiffs' lack of subjective knowledge that the Coal Tax was unconstitutional until it was so held in *Ranger Fuel* is irrelevant because the unconstitutionality of the tax was fixed when it was enacted and plaintiffs' damages were established when they paid the unconstitutional tax.
Plaintiffs' argument that the six-year limitations period was *tolled* until the *Ranger Fuel* decision in 1998 because, until then, their claim was "inherently unknowable," is deficient for similar reasons.

[2][3] To toll the statute of limitations, a claimant must "show either 'that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was inherently unknowable at the accrual date.' " *Alliance of Descendants,* 37 F.3d at 1482 (quoting *Japanese War Notes,* 373 F.2d at 359). "Ignorance of rights which should be known" does not suffice to toll a statute of limitations. *Catawba Indian Tribe,* 982 F.2d at 1571 (quoting *Japanese War Notes,* 373 F.2d at 358-59).

[4] Plaintiffs do not allege concealment or misleading

conduct but, only again, that their claim was "inherently unknowable" until the *Ranger Fuel* decision, because acts of Congress are presumed to be constitutional. The presumption of constitutionality, however, is an element of the doctrine of judicial restraint with respect to legislative branch actions. *See United States v. Morrison,* 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000); *United States v. Lopez,* 514 U.S. 549, 568, 577-578, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (KENNEDY, J., concurring). *See also United States v. Harris,* 106 U.S. 629, 635, 1 S.Ct. 601, 27 L.Ed. 290 (1882) (holding: "Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated").

***55** The other cases relied upon by plaintiffs do not support their contention that the claim was "inherently unknowable" until the *Ranger Fuel* decision. Plaintiffs' reliance on *L.S.S. Leasing Corp. v. United States,* 695 F.2d 1359 (Fed. Cir.1982) is misplaced since it dealt with claim accrual, not tolling.

Plaintiffs also rely on *Virginia Dare Neely v. United States,* 546 F.2d 1059 (3d Cir.1976), and *United States v. One 1961 Red Chevrolet Impala Sedan,* 457 F.2d 1353 (5th Cir.1972). These cases are not binding on this court and are clearly distinguishable, involving claims that were filed to obtain the benefit of a new constitutional rule that the Supreme Court expressly held to have retroactive application, in

United States v. United States Coin Currency, 401 U.S. 715, 723-24, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971).

In *Neely,* the Third Circuit merely held that the Tucker Act's six-year limitations period was suspended as to claims for refund of fines and costs paid to the government in connection with convictions later held to be unconstitutional. Given its inability to predict the change in the law effected by the Supreme Court, the Third Circuit stated, "To require clairvoyance in predicting new jurisprudential furrows plowed by the Supreme Court, under these circumstances, would be to impose an unconscionable prerequisite to asserting a timely claim." *Neely,* 546 F.2d at 1068. In effect, the Supreme Court created a new cause of action; the plaintiffs in *Neely* and *Red Chevrolet,* unlike the plaintiffs here, could not have filed their claims earlier because they had no grounds for a claim until the Supreme Court announced its new constitutional rule in *Marchetti v. United States,* 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968) and *Grosso v. United States,* 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968).

Plaintiffs point to no decision they relied upon that was reversed by the *Ranger Fuel* decision, nor any decision that would have made their cause of action unknowable prior to the district court decision. Although their cause of action was untested, the courts were completely open to them as they were to the plaintiffs in *Ranger Fuel.* Plaintiffs' choice not to file their claim based on their subjective ignorance that they had a cause of action, until the plaintiffs in *Ranger Fuel* succeeded, cannot provide them with a basis for tolling the Tucker Act's six-year statute of limitations. *See Boling*

v. United States, 220 F.3d 1365 (Fed.Cir.2000) (holding that adverse precedent, which made claim more difficult, did not provide basis for equitable tolling); *Menominee Tribe of Indians v. United States,* 726 F.2d 718, 720- 21 (Fed. Cir.1984), *cert. denied,* 469 U.S. 826, 105 S.Ct. 106, 83 L. Ed.2d 50 (1984) (holding that ignorance of legal rights will not toll a statute). Such reasoning could double the statutory period wherever a pioneering complaint is filed at the end of an initial period.

Finally, plaintiffs argue that the Due Process Clause of the Fifth Amendment permits them "to meaningful backward looking relief" for *each* year that they paid taxes pursuant to the unconstitutional statute. In essence, plaintiffs argue that the statute of limitations should not apply because their claim is based on an unconstitutional tax. The decisions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) and *Stone Container Corp. v. United States,* 229 F.3d 1345 (Fed.Cir.2000) do not, as they claim, support these contentions.

In *McKesson,* the Supreme Court reversed a Florida Supreme Court decision holding that taxpayers were not entitled to a tax refund, even though the tax at issue unconstitutionally discriminated against interstate commerce. The Court held that "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief," *McKesson,* 496 U.S. at 31, 110 S.Ct. 2238, but permitted a state to "enforce relatively short statutes of limitations applicable to such actions." *Id.* at 45, 110 S.Ct. 2238.

The Federal Circuit in *Stone Container Corp.*, consistent with *McKesson,* expressly rejected the argument that it would be impermissible to apply a statute of limitations to bar recovery of an unconstitutional tax. *Stone Container Corp.*, 229 F.3d at 1349-50. The Federal Circuit pointed out that the federal government can enforce such a statute of limitations because a claim for refund of an unconstitutional tax is, in effect, a claim ***56** for deprivation of property without due process, which, as the Supreme Court has held, may be time-barred. *Id.* at 1350 (citing *Block v. North Dakota,* 461 U.S. 273, 292, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) and *Boling v. United States,* 220 F.3d 1365, 1375 (Fed.Cir.2000)).

Conclusion

Defendant's motion to dismiss plaintiffs' complaint for lack of jurisdiction is granted. The clerk of the court shall enter judgment for defendant. No costs.

57 Fed.Cl. 52, 91 A.F.T.R.2d 2003-2379, 2003-1 USTC P 50,510

App. 3

Briefs and Other Related Documents
UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

VENTURE COAL SALES COMPANY,
Sanner Energies, Inc., and Future Industries, Inc.,
Plaintiffs-Appellants,
v.
UNITED STATES, Defendant-Appellee.

No. 03-5132.

June 1, 2004.

Background: Taxpayer filed complaint against United States, seeking to recover coal sales taxes paid for first quarter of 1988 through second quarter of 1995. The United States Court of Federal Claims, Diane Gilbert Sypolt, J., granted judgment for United States, 57 Fed.Cl. 52. Taxpayers appealed.

Holdings: The Court of Appeals, Lourie, Circuit Judge, held that:

(1) taxpayer's cause of action under Tucker Act for refund of coal sales taxes accrued when it paid those taxes, not when statute that required payment of those taxes was ruled unconstitutional, and

(2) taxpayer was not entitled to tolling of six year statute of limitations.

Affirmed.

West Headnotes

[1] Federal Courts 776
170Bk776 Most Cited Cases

The dismissal of a case by the Court of Federal Claims for lack of subject matter jurisdiction is a legal determination that the Court of Appeals reviews de novo.

[2] Federal Courts 776
170Bk776 Most Cited Cases

Whether equitable principles can constitute a cognizable defense to the Tucker Act's statute of limitations is a question of law that the Court of Appeals reviews de novo. 28 U.S.C.A. § 2501.

[3] Limitation of Actions 58(6)
241k58(6) Most Cited Cases

Taxpayer's cause of action under Tucker Act for refund of coal sales taxes accrued when it paid those taxes, not when statute that required payment of those taxes was ruled unconstitutional under export clause; later judicial pronouncement, which held that tax was unconstitutional,

was not action that damaged taxpayer, instead, taxpayer was damaged by payment of taxes, and six year statutory period under Tucker Act provided meaningful look-back period during which taxpayer could have challenged those taxes as unconstitutional, while at same time it protected government's financial planning. U.S.C.A. Const. Art. 1, § 9, cl. 5; 28 U.S.C.A. § 2501.

[4] Limitation of Actions 95(3)
241k95(3) Most Cited Cases

Taxpayer was not entitled to tolling of six year statute of limitations under Tucker Act to assert cause of action for refund of coal sales taxes, which had been found by later judicial pronouncement to be unconstitutional under export clause; although taxpayer justifiably assumed that statute enacted by Congress was presumptively constitutional, export clause had been in existence for over two hundred years, claim for damages from invalid statute accrued upon making payment under statute, taxpayer knew that it paid coal sales tax on exported coal, and it should have known that it had been injured when it paid the tax. U.S.C.A. Const. Art. 1, § 9, cl. 5; 28 U.S.C.A. § 2501.

[5] Limitation of Actions 58(1)
241k58(1) Most Cited Cases

A claim for damages from an invalid statute accrues on making a payment under the statute.

***1103** Vincent J. Barbera, Barbera, Clapper, Beener, Rullo

& Melvin, of Somerset, PA, argued for plaintiffs-appellants.

Richard T. Morrison, Deputy Assistant Attorney General, Tax Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Eileen J. O'Connor, Assistant Attorney General, and Thomas J. Clark, Attorney.

Before LOURIE, SCHALL, and LINN, Circuit Judges.

LOURIE, Circuit Judge.

Venture Coal Sales Company, Sanner Energies, Inc., and Future Industries, Inc. (collectively "Venture Coal") appeal from the decision of the United States Court of Federal Claims granting the government's motion to dismiss for lack of subject matter jurisdiction. *Venture Coal Sales Co. v. United States,* 57 Fed. Cl. 52 (2003). For the reasons set forth below, we affirm.

BACKGROUND

The appellants are three Pennsylvania coal companies in the business of mining and selling coal, both domestically and through export. During the period beginning with the first quarter of 1988 and ending with the second quarter of 1995, the companies paid a tax on all the coal they produced, pursuant to the Coal Sales Act, 26 U.S.C. § 4121 (1994) ("Coal Sales Tax"). The tax was imposed both on coal sold domestically and on coal that was exported. Section 4221(a)

of Title 26 of the United States Code lists certain sales as exempt from taxation under that chapter of the code, but specifically excludes the Coal Sales Tax from that exemption. *Id.* § 4221(a) ("[N]o tax shall be imposed under this chapter (*other than section 4121* ...) on the sale by the manufacturer ... of an article ... for export, ... but only if such exportation ... is to occur before any other use." (emphasis added)).

In September 1997, seven coal corporations, not including the appellants, filed a complaint in the United States District Court for the Eastern District of Virginia, seeking a refund of taxes on exported coal paid between January 1 and March 31 of that same year. In 1998, the district court held in that case that the Coal Sales Tax violated the Export Clause of the United States Constitution, art. I, § 9, cl. 5, and ordered a refund of the taxes to those coal corporations. *Ranger Fuel Corp. v. United States,* 33 F.Supp.2d 466 (E.D. Va.1998). [FN1]

> FN1. The government acquiesced to the ruling in *Ranger Fuel* that the Coal Sales Tax was unconstitutional by issuing a notice to the public in the Cumulative Bulletin, Notice 2000-28, 2000-1 C. B. 1116 (May 22, 2000).

In October 2003, the appellants, who were not parties to the Virginia lawsuit, filed suit in the United States Court of Federal Claims seeking a refund of taxes paid on coal they exported from 1988 through 1995 pursuant to the Coal Sales Act. They alleged jurisdiction in the Court of Federal

Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1) (1994). The government, however, argued that the plaintiffs ***1104** failed to bring their suit within the six-year statute of limitations period for Tucker Act claims, *id.* § 2501, as the taxes were paid more than seven years before the suit was initiated. Accordingly, the government moved to dismiss the suit for lack of subject matter jurisdiction, and the Court of Federal Claims granted the motion. The coal companies appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

[1][2] The Court of Federal Claims' dismissal of a case for lack of subject matter jurisdiction is a legal determination that we review de novo. *Frazer v. United States,* 288 F.3d 1347, 1351 (Fed.Cir.2002). Similarly, "[w]hether equitable principles can constitute a cognizable defense to the statute of limitations codified at [28 U.S.C.] § 2501 is a question of law that we also review de novo. *Id.*

I. *Accrual of Claims*

[3] On appeal, Venture Coal disputes the application of § 2501. It argues that its claims accrued only when the Eastern District of Virginia rendered its *Ranger Fuel* decision in 1998. Venture Coal alleges that only when the district court first held that the statute was unconstitutional and then awarded the plaintiffs in that case damages in the form of refunded taxes did a cause of action accrue. Venture Coal maintains that until that decision, events sufficient to support its own claim had not yet occurred and it had no cause of action. Thus, because it initiated its suit

within six years of that decision, Venture Coal argues that its own case was timely filed and was not barred by the statute of limitations.

In support of its position, Venture Coal cites *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 31, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), for the proposition that the Due Process Clause of the Fourteenth Amendment provides for "meaningful backward-looking relief to rectify any unconstitutional deprivation." Venture Coal reasons that the Supreme Court in that case intended that there be an open-ended period for recovery of taxes paid in cases in which the tax is later found to be unconstitutional, but that the statute of limitations might otherwise bar recovery. Moreover, it argues that in *Swisher International, Inc. v. United States,* 205 F.3d 1358 (Fed. Cir.2000), this court held that a claim for refund of an unconstitutional tax could be filed outside the applicable statute of limitations.

The government responds that a new claim accrued each time Venture Coal paid the Coal Sales Tax. It argues that Venture Coal, like the plaintiffs in *Ranger Fuel,* could have filed suit as soon as it paid the tax. The government asserts that the claims are time-barred because Venture Coal filed its suit after the six-year period permitted by 28 U.S.C. § 2501. With respect to *McKesson,* the government counters that the Supreme Court stated in that case that a lawsuit seeking the refund of an unconstitutional state tax should be governed by the appropriate state statute of limitations.

Thus, it argues that enforcement of the six-year statute of limitations period here is consistent with *McKesson.* The government further asserts that *Hatter v. United States,* 203 F.3d 795 (Fed.Cir.2000) (en banc), *aff'd in part, rev'd in part,* 532 U.S. 557, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001), supports its position that the recovery of taxes that were unconstitutionally imposed is limited to the six-year period preceding the filing of suit under Tucker Act jurisdiction.

We agree with the government that Venture Coal's claims are barred by the ***1105** statute of limitations. [FN2] Section 2501 of Title 28 of the United States Code provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." We have held that "a claim does not accrue until all events necessary to fix the liability of the defendant have occurred--when 'the plaintiff has a legal right to maintain his or her action.' " *Catawba Indian Tribe v. United States,* 982 F.2d 1564, 1570 (Fed.Cir.1993) (quoting Calvin W. Corman, *Limitation of Actions* § 6.1, at 374 (1991)). In *Catawba,* the Indian tribe argued, in an effort to avoid the same statute of limitations now contested, that the 1962 Termination Act relinquishing tribal ownership of certain South Carolina lands to that state's government did not become operative against the tribe until the Supreme Court ruled on its case. Thus, Catawba argued, there was no damage or injury to the tribe until that judicial interpretation of the statute was rendered, and its claim did not accrue

until that decision was issued in 1986. We disagreed, stating that:

> FN2. The trial court characterizes the ground of its decision as being a lack of subject matter jurisdiction, and it is true that we have stated that "the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act." *Caguas Cent. Fed. Sav. Bank v. United States,* 215 F.3d 1304, 1310 (Fed.Cir.2000). However, the Court of Federal Claims certainly has subject matter jurisdiction over claims for refund of taxes, and it had jurisdiction over this case to determine when Venture Coal's claim accrued. The most precise ground for the trial court's decision here therefore would seem to be that Venture Coal failed to make its claim within the required limitations period--that is not a question of subject matter jurisdiction of the court. *See Spruill v. Merit Sys. Prot. Bd.,* 978 F.2d 679 (Fed.Cir.1992) (discussing the distinction between lack of jurisdiction and the failure to state a claim); *see also Bray v. United States,* 785 F.2d 989, 992 (Fed.Cir.1986).

While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect

were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.

Id. Accordingly, we held that the tribe's claim was barred by § 2501.

The same rule applies here. Each time that Venture Coal paid the Coal Sales Tax, the language of the statute and its possible unconstitutional nature were thus fixed, injury was inflicted, and a separate claim accrued when Venture Coal remitted each payment of the Coal Sales Tax. *See Hatter,* 203 F.3d at 797, 799-800 (holding that each time a tax is paid under an unconstitutional statute, a separate claim accrues under the continuing claim doctrine and the six-year period starts to run). Venture Coal thus was able to bring its claims as soon as the taxes were paid. The 1998 decision of the Eastern District of Virginia in *Ranger Fuel*--a "later judicial pronouncement" in *Catawba* parlance--holding that the tax was unconstitutional was not the action that damaged Venture Coal, and thus it cannot serve as the jurisdictional trigger for Venture Coal's Tucker Act claims.

We accordingly reject Venture Coal's argument that the district court's specific holding of unconstitutionality in *Ranger Fuel* started the running of the six-year statute of limitations period. Venture Coal relies on the notion that the district court's reasoning can be partitioned to yield separate determinations on constitutionality and damages. We find no merit in that artificial construction of the district court's opinion. Venture Coal's position ***1106** would

effectively remove the statute of limitations from nearly all similar lawsuits because any claim filed subsequent to a decision that a particular tax was unconstitutional would be entitled to recovery of all past taxes, regardless when the taxes were actually paid. Rather, the constitutionality challenge and the refund request are the same cause of action. The holding that the tax was unconstitutional was simply the confirmation of the correctness (at least as determined by one district court) of the legal theory behind the plaintiffs' claim for a refund; without the refund request, the plaintiffs arguably lacked standing because there would be no other injury asserted. Venture Coal was entitled to challenge the Coal Sales Tax when it paid the taxes as much as were the plaintiffs in *Ranger Fuel.*

Additionally, *McKesson* does not support Venture Coal's position. In that case, the Florida Supreme Court held that a specific state tax was unconstitutional. However, it refused to grant the petitioner *any* refund for taxes already paid because of the state's interest in fiscal stability. The United States Supreme Court reversed, emphasizing the state's responsibility to provide an avenue for *some* retrospective relief to taxpayers contesting the validity of a state tax. The Court held that "the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." 496 U.S. at 22, 110 S.Ct. 2238. However, the Court stated that a state was free to "impose various procedural requirements on actions for postdeprivation relief," including the enforcement of

"relatively short statutes of limitation." *Id.* at 44-45, 110 S. Ct. 2238. Such safeguards were stated to be necessary to balance the government's obligation to provide meaningful relief to aggrieved taxpayers with its own need for "sound fiscal planning." *Id.* at 44, 110 S.Ct. 2238. In the case before us, enforcement of the six-year limitations period serves as such an appropriate procedural requirement consistent with the *McKesson* holding. [FN3] Unlike the *McKesson* plaintiffs who were denied any opportunity for post-deprivation relief, Venture Coal had the chance to obtain such relief, but failed to comply with the statutory deadline. The six-year statutory period under the Tucker Act provides a meaningful lookback period during which plaintiffs may challenge taxes as unconstitutional, while at the same time it protects the government's financial planning.

> FN3. Importantly, the Court assumed that the plaintiffs in *McKesson* were in "apparent compliance with the statutory requisites for preserving a claim" under applicable state laws and regulations. 496 U. S. at 24, 110 S.Ct. 2238. It noted that a postpayment refund action must be filed within the applicable limitations period in order to preserve the right to challenge a tax under Florida law. *Id.* at 24 n. 4, 110 S.Ct. 2238 (citing Fla. Stat. § 215.26(2) (1985) (generally applicable three-year limitations period for tax refund actions)). The Court acknowledged that upon remand, if compliance was not found, that fact could serve as an appropriate alternative ground for denying the refund. *Id.*

Venture Coal's argument based on *Swisher* is likewise unpersuasive. Although that case relates to refunds of the unconstitutional Harbor Maintenance Tax, it focused primarily on protest procedures unique to the Court of International Trade and their impact on the court's jurisdiction. Contrary to the apparently open-ended customs regulations in *Swisher* relating to the time for filing refund requests, *see* 19 C.F.R. § 24.24(e)(5) (1999), Venture Coal's suit in the instant case is based on jurisdiction under the Tucker Act, which our precedent clearly states is subject to its statute of limitations. *See Brown Park Estates-*1107 Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455 (Fed.Cir.1997).

Because the appellants filed their suit more than six years after the tax payments for which they now request a refund, the case is barred by 28 U.S.C. § 2501.

II. *Tolling*

[4] Alternatively, Venture Coal asserts that the statute of limitations should be tolled because it did not know nor could it have known in the exercise of reasonable diligence that its claims had accrued. The government responds that Venture Coal has not shown that its injury was inherently unknowable. Instead, the government urges that Venture Coal merely pleads ignorance of its legal rights, a defense that is not sufficient to invoke tolling. We agree with the government that Venture Coal is not entitled to tolling of the statute of limitations.

In *Japanese War Notes Claimants Ass'n of the Philippines, Inc. v. United States,* 178 Ct.Cl. 630, 373 F.2d 356 (1967), the Court of Claims commented that in order to toll the statute of limitations for filing a claim against the government,

> [a] [p]laintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was "inherently unknowable" at the accrual date.... In [the latter] situation the statute will not begin to run until plaintiff learns or reasonably should have learned of his cause of action.

Id. at 359 (footnote omitted).

[5] Venture Coal does not meet that test. Its argument that its injury was "inherently unknowable" until the issuance of the 1998 *Ranger Fuel* decision because acts of Congress are considered constitutional is flawed. It is correct that, as the Court of Federal Claims has properly stated, that concept reflects "judicial restraint with respect to legislative branch actions," *Venture Coal Sales,* 57 Fed. Cl. at 54, and represents "[d]ue respect for the decisions of a coordinate branch of Government," *United States v. Morrison,* 529 U. S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). However, reliance on that presumption does not support Venture Coal's tolling argument. That Venture Coal may have justifiably assumed that a statute enacted by Congress was presumptively constitutional does not change the precedential rule that a claim for damages from an invalid statute accrues on making a payment under the statute. *See*

Hatter, 203 F.3d at 797-98. The government points out that Venture Coal knew that it paid the Coal Sales Tax on exported coal and that Venture Coal therefore should have known that it had been injured when it paid the tax. The Export Clause, of course, has been in existence for over two hundred years, and Venture Coal thus had all the facts necessary to initiate a claim against the United States. What it argues now is not that it lacked *sufficient facts* on which it could sue, but rather it did not know the *legal theory* on which its refund claim might succeed. That argument must fail; as our predecessor court has explained, "[i]gnorance of rights which should be known is not enough." *Jap. War Notes Claimants Ass'n*, 373 F.2d at 359.

CONCLUSION

We have considered the appellants' remaining arguments and are not persuaded. For the aforementioned reasons, we conclude that appellants' claims are barred by the statute of limitations, and we accordingly affirm.

***1108** COSTS

No costs.

AFFIRMED.

370 F.3d 1102, 93 A.F.T.R.2d 2004-2495, 2004-2 USTC P 50,312

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Supreme Court was served upon the following, on the date indicated below, by first-class United States Mail, postage prepaid, addressed as follows:

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Supreme Court, U.S.
FILED
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No. 04-306

In the Supreme Court of the United States

VENTURE COAL SALES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners filed this suit seeking a refund of excise taxes paid on their coal exports on the ground that exaction of the tax violated the Export Clause of the Constitution. Before petitioners filed suit, a federal district court in another case had declared that the excise tax was unconstitutional as applied to coal exports. The question presented is whether the limitations period for filing petitioners' suit began to run when petitioners paid the tax, or instead did not begin to run (or was tolled) until the federal district court issued its decision.

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In the Supreme Court of the United States

No. 04-306

VENTURE COAL SALES COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3, at 15-29[1]) is reported at 370 F.3d 1102. The opinion of the Court of Federal Claims (Pet. App. 2, at 3-14) is reported at 57 Fed. Cl. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2004. The petition for a writ of certiorari was filed on August 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The Appendix in this petition has no page numbers. For the convenience of the Court we are citing the Appendix as if numbered consecutively 1-29.

STATEMENT

In October 2002, petitioners brought suit in the United States Court of Federal Claims seeking to recover taxes collected by the Internal Revenue Service from 1988 through 1995. The Court of Federal Claims dismissed the complaint on the ground that it had not been filed within the applicable limitations period. The court of appeals affirmed. Pet. App. 2, at 7; Pet. App. 3, at 19-20, 29.

1. Petitioners produce and sell coal subject to the tax imposed by Section 4121 of the Internal Revenue Code of 1986, 26 U.S.C. 4121. Pet. App. 3, at 18. Section 4121 imposes a tax "on coal from mines located in the United States sold by the producer." 26 U.S.C. 4121(a)(1). The statute on its face contains no exemption for exported coal. From the first quarter of 1988 through the second quarter of 1995, petitioners paid the excise tax on their coal exports. Pet. App. 3, at 18.

2. In *Ranger Fuel Corp.* v. *United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998), a number of coal companies, other than petitioners here, successfully sued for a refund of the excise taxes they had paid on exported coal pursuant to 26 U.S.C. 4121. The district court held in that case that the excise tax was unconstitutional as applied to exported coal because it violated the Export Clause, U.S. Const. Art. I, § 9, Cl. 5, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." The government did not appeal from that decision, and the IRS published an acquiescence to it. I.R.S. Notice 2000-28, 2000-1 C.B. 1116.

3. On October 23, 2002,[2] petitioners brought suit in the Court of Federal Claims seeking to recover taxes they paid on their coal exports from the first quarter of 1988 through the second quarter of 1995. Pet. App. 2, at 7; Pet. App. 3, at 18-19. The Court of Federal Claims dismissed the complaint for lack of subject matter jurisdiction, because petitioners' claims were barred by the six-year statute of limitations in 28 U.S.C. 2501. Pet. App. 2, at 3-14. The court explained that petitioners' claims "accrued each time [they] paid tax on coal sold for export," because "the unconstitutionality of the tax was fixed when it was enacted" and thus petitioners' "damages were established when they paid the unconstitutional tax." *Id.* at 9-10. The statute of limitations was not tolled until the *Ranger Fuel* decision because "the courts were completely open to [petitioners] as they were to the plaintiffs in *Ranger Fuel*"—petitioners could not point to any adverse "decision that would have made their cause of action unknowable prior to" the *Ranger Fuel* decision. *Id.* at 12. Moreover, although this Court in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990), held that the Due Process Clause requires States to provide "meaningful backward-looking relief" when taxes are found to be unconstitutional, this Court also expressly permitted States to impose on such actions "relatively short statutes of limitations." Pet. App. 2, at 13 (quoting *McKesson*, 496 U.S. at 45).

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[2] The Federal Circuit erroneously stated in its opinion that the complaint was filed in October 2003. Pet. App. 3, at 19. Petitioners' complaint was filed on October 23, 2002. Pet. App. 2, at 7; see Pet. C.A. Br. App. at 12 (No. 03-5132) (note dated stamp). The error is not germane, however, because regardless of whether the suit was filed in 2002 or 2003, it was filed more than six years after the latest taxes at issue were paid.

4. The court of appeals affirmed. Pet. App. 3, at 15-29. The court rejected petitioners' claim that the decision in *Ranger Fuel* served as the "jurisdictional trigger" for petitioners' claims, because that decision "was not the action that damaged [petitioners]." *Id.* at 24. Instead, the court held that petitioners suffered an injury each time they made a payment of tax on their coal exports, and thus a separate claim accrued upon each payment for which they could have sought a refund. *Ibid.* The court also rejected petitioners' argument that they were entitled to relief under this Court's decision in *McKesson*, *supra*. Relying on this Court's statement that a taxing authority "was free to 'impose various procedural requirements on actions for postdeprivation relief,' including the enforcement of 'relatively short statutes of limitation,'" the court of appeals concluded that "[i]n the case before us, enforcement of the six-year limitations period serves as such an appropriate procedural requirement consistent with the *McKesson* holding." Pet. App. 3, at 25-26.

Finally, the court of appeals rejected petitioners' argument "that the statute of limitations should be tolled because [they] did not know nor could [they] have known in the exercise of reasonable diligence that [their] claims had accrued." Pet. App. 3, 27. The court explained that petitioners "had all the facts necessary to initiate a claim against the United States," and were unaware only of "the *legal theory* on which [their] refund claim might succeed." *Id.* at 29. Petitioners were thus not entitled to tolling, because "[i]gnorance of rights which should be known is not enough." *Ibid.* (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners' contention (Pet. 5-8) that their claims did not accrue until *Ranger Fuel* was decided, and thus that their complaint is timely, is meritless. In *Cyprus Amax Coal Co.* v. *United States*, 205 F.3d 1369 (2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that constitutionally-based causes of action seeking recovery of excise taxes paid on exported coal are governed by the six-year limitations period of 28 U.S.C. 2501, rather than the three-year limitations period applicable to administrative refund claims under 26 U.S.C. 6511(a). 205 F.3d at 1372.[3]

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[3] Although we did not challenge the holding of *Cyprus Amax* in our briefs below, the position of the United States is that *Cyprus Amax* was decided incorrectly. When Congress waived the sovereign immunity of the United States and permitted tax-refund suits, it prescribed in great detail a particular track for claimants to follow, in administrative or judicial proceedings. See 26 U.S.C. 7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."). *Cyprus Amax* erroneously gave claimants the ability to sue under the Tucker Act and thereby bypass the exclusive refund procedures established by Congress. A broad jurisdictional statute such as the Tucker Act cannot displace the specific provisions of the refund statutes, such as 26 U.S.C. 7422. This issue is jurisdictional, moreover, because it implicates the sovereign immunity

Applying that holding, the court of appeals correctly concluded that petitioners' claims accrued, and thus the statute began to run, each time they paid taxes. A claim accrues "on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Bowen* v. *United States*, 292 F.3d 1383, 1385 (Fed. Cir. 2002) (quoting *Chandler* v. *United States*, 47 Fed. Cl. 106, 113 (2000), aff'd, 7 Fed. Appx. 957 (Fed. Cir. 2001)). As the court explained, "[e]ach time that [petitioners] paid the Coal Sales Tax, the language of the statute and its possible unconstitutional nature were thus fixed, injury was inflicted, and a separate claim accrued." Pet. App. 3, at 24.[4] Thus, petitioners had the same right to file a suit for refund upon payment of the tax as did the coal companies that in fact brought suit in *Ranger Fuel*.

2. Petitioners also err in asserting (Pet. 8-10) that the statute of limitations was tolled until *Ranger Fuel* was decided. Petitioners contend (*ibid.*) that their

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of the United States. This Court has recognized that "[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit," as well as that "one of those terms" is "[a] statute of limitations requiring that a suit against the Government be brought within a certain time period." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990) (internal quotation marks and citations omitted); see, *e.g.*, *United States* v. *Williams*, 514 U.S. 527, 534 n.7 (1995); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983).

[4] Indeed, this case is no different from *Hatter* v. *United States*, 203 F.3d 795 (Fed. Cir. 2000), rev'd in part on other grounds, 532 U.S. 557 (2001), in which the court held that a claim accrued each time the United States improperly deducted moneys from judges' pay. See *Catawba Indian Tribe* v. *United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993), cert. denied, 509 U.S. 904 (1993).

claims were "inherently unknowable" prior to that time, but petitioners' mere ignorance of their legal rights is not sufficient to toll the statute of limitations. See *Menominee Tribe of Indians* v. *United States*, 726 F.2d 718, 720-721 (Fed. Cir.) ("28 U.S.C. § 2501 is not tolled by the [plaintiffs'] ignorance of their *legal* rights"), cert. denied, 469 U.S. 826 (1984); *Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967).[5] Consequently, petitioners are not entitled to a tolling of the limitations period.

3. Petitioners err in contending (Pet. 5-10) that the decision below conflicts with *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972), and *Neely* v. *United States*, 546 F.2d 1059 (3d Cir. 1976). Those cases involved the application of this Court's decision in *Marchetti* v. *United States*, 390 U.S. 39 (1968), which had overruled two earlier decisions of the Court.

In *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953), and *Lewis* v. *United States*, 348 U.S. 419, 421-423 (1955), the Court had held that certain wagering tax provisions of the Internal Revenue Code, which required persons engaged in the business of accepting wagers to register with the Internal Revenue Service

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[5] Indeed, the courts of appeals have recognized that even the existence of adverse authority that affects the viability of an unasserted cause of action does not automatically toll the statute of limitations. *Boling* v. *United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000); *Fiesel* v. *Board of Educ.*, 675 F.2d 522, 524-525 (2d Cir. 1982); *Versluis* v. *Town of Haskell*, 154 F.2d 935, 943 (10th Cir. 1946); see *McConnell* v. *Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) ("A decision recognizing a cause of action after the period has run does not retroactively interrupt the running of the limitations period.").

and to pay an occupational tax, did not violate the Fifth Amendment privilege against self-incrimination. In *Marchetti*, the Court overruled *Kahriger* and *Lewis*, and held that the Fifth Amendment privilege could be raised as a defense to a criminal prosecution charging failure to file the required forms. 390 U.S. at 54. Three years later, in *United States* v. *United States Coin & Currency*, 401 U.S. 715 (1971), the Court held that *Marchetti* had retroactive effect, and that persons who had been required to forfeit property following their convictions under the statute could recover the property. *Id.* at 722-724.

At issue in both *One 1961 Red Chevrolet* and *Neely* was whether actions by taxpayers to recover property they had forfeited following their convictions for failure to register were barred by the statute of limitations. In *One 1961 Red Chevrolet*, the Fifth Circuit held that the limitations period did not begin to run until *Marchetti* was decided, because until that time the taxpayer "had no reasonable probability of successfully prosecuting his claim." 457 F.2d at 1358. In *Neely*, the Third Circuit held that in light of *Kahriger* and *Lewis*, the taxpayer's claim was "inherently unknowable" until *Marchetti* was decided, and thus the running of the limitations period was suspended until that time. 546 F.2d at 1068.

One 1961 Red Chevrolet and *Neely* are thus far different from the instant case. In those cases, the actions brought by the taxpayers—to recover property they had forfeited following their convictions under a statute held to be unconstitutional in *Marchetti*—were, until *Marchetti*, barred by this Court's decisions in *Kahriger* and *Lewis*. In contrast, no prior decisions of this Court —or of any other court, for that matter—would have barred petitioners from filing a timely suit to recover

the taxes they had paid on their coal exports. Unlike *One 1961 Red Chevrolet* and *Neely*, the legal theory upon which petitioners now seek a refund has never been rejected by any court. The decision below thus does not conflict with *One 1961 Red Chevrolet* or *Neely*.

4. Finally, petitioners' argument (Pet. 10-12) that their petition should be granted so that the Court may elaborate on the "meaningful backward-looking relief" standard it enunciated in *McKesson* is similarly unwarranted. 496 U.S. at 31. In *McKesson*, the Florida Supreme Court had denied a taxpayer any right to a refund of state taxes paid under a statute that the court had declared unconstitutional. *Id.* at 22. This Court reversed, holding that, when taxpayers must pay taxes first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a "meaningful opportunity" to secure postpayment relief for taxes paid under a statute later found to be unconstitutional. *Ibid.* In so holding, however, the Court recognized that, in order to engage in sound fiscal planning, a State is free to impose various procedural requirements on actions for postdeprivation relief, including the enforcement of "relatively short statutes of limitations." *Id.* at 45. The six-year limitations period applied by the courts below (or, for that matter, the three-year limitations period applicable under 26 U.S.C. 6511(a)) plainly satisfies the "meaningful opportunity" requirement. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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